Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-4231

JERRY TIMOTHY JONES,
Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. ————————

JERRY TIMOTHY JONES,
Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner appeals from the judgment of the Court of Appeals of Kentucky, entered June 20, 1975, following remand from the Supreme Court of The United States, affirming a judgment of guilt, and reaffirming its judgment of January 18, 1974. Petitioner submits this statement to demonstrate that the Supreme Court of The United States has jurisdiction of the appeal and that a substantial constitutional question is presented.

OPINIONS BELOW

The June 20, 1975 Memorandum Opinion of the Court of Appeals of Kentucky is reported at —— S.W.2d —— (Ky. 1973). The Opinion is attached hereto as Appendix B.

The October 12, 1973 Memorandum Decision of the Court of Appeals of Kentucky is reported at 503 S.W. 2d 757 (Ky. 1973). The Opinion was ordered not to be published, but is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered June 20, 1975. This Petition is filed within the Ninety (90) Day period prescribed by Rule 22 of the Supreme Court of the United States. Notice of this Appeal was given to the Court of Appeals of Kentucky on August 1, 1975. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

Whether present procedures concerning hearings to determine competency at time of trial are adequate to protect the constitutional rights of all Defendants to be free from conviction while legally incompetent.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION AMENDMENT XIV

SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

18 United States Code § 4244

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the Court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the Court.

KENTUCKY REVISED STATUTES

203.015 Examining physician; psychologist; qualifications, certificate; contents.

(1) When the petition has been properly filed with the Clerk of the Court, the Court shall appoint two physicians or one physician and one certified clinical psychologist licensed under the provisions of KRS Chapter 319 to examine the defendant and to certify to the court as to whether they find the defendant mentally disabled.

(2) Where possible, the physicians or physician selected shall have made a special study of mental deficiency and mental disease. The examiners, either physicians or physician and certified clinical psychologist, shall be entitled to a fee of ten dollars each for such examination and certification, to be paid by the county in which the petition is filed, upon a certified copy of an order of allowance made by the court holding the inquest.

(3) The certificate shall state that the defendant has been examined by each of the medical examiners making the certificate within three days prior to the date of the certificate.

KENTUCKY RULES OF CRIMINAL PROCEDURE

8.06 Insanity.

If upon arraignment or during the proceedings there are reasonable grounds to believe that the Defendant is insane, the proceedings shall be postponed and the issue of sanity determined as provided by law. If the Defendant is found to be insane, the Court shall direct that he be confined in a mental institution until his mind is restored, at which time he shall be returned to the Court for further proceedings.

STATEMENT OF THE CASE

On April 28, 1975 this Court entered the following Order in the case of *Jones* v. *Kentucky*, 73-1884:

> The Petition for Writ of Certiorari is granted, the judgment is vacated, and the case is remanded to the Court of Appeals of Kentucky for further consideration in light of *Drope* v. *Missouri*, 420 U.S. —— (1975).

The Defendant's first Petition for Certiorari was based on the denial of his pre-trial Motion for a Competency hearing. The essence of the argument was that Kentucky Law allowed Trial Judges overly broad discretion with regard to denial of such Motions, thereby inadequately protecting the right of an accused from being convicted while legally incompetent. Subsequent to the filing of the Petition, this Court decided the case of *Drope* v. *Missouri*, 420 U.S. ——, 95 S.Ct. 896 (1975).

On remand, the Kentucky Court of Appeals reconsidered the evidence of the instant case in light of the *Drope* Opinion. Finding no evidence of "bizarre behavior" by Defendant Jones, and apparently disbelieving or disregarding evidence of Defendant's prior treatment for psychological disorders, the Kentucky Court found the *Jones* case to be factually distinct from *Drope* and so reaffirmed the judgment of conviction.

Jerry Timothy Jones was indicted for wilful murder on January 11, 1972. The trial was initially set April 18, 1972, but had to be continued because Jones was hospitalized (TE 136; TR 4, 5). Jerry Jones is a sick man. He suffers from various mental and physical infirmities (TE 135). He has been under continuous doctor's care and sporadically in and out of hospitals since 1959 (TE 118, 119, 120, 131, 132, 133, 135).

The trial was reset for August 8, 1972, but again had to be continued because Jones was in the hospital (TE 122). On the day prior to the next scheduled date for the trial Defense counsel filed a Motion for a competency hearing and a supporting detailed Affidavit (set out in Appendix D.) The Affiant, Defendant's mother, attested to Defendant's serious infirmities and history of psychiatric treatment. Counsel moved the Court to order a continuance so that Jones' competency to stand trial could be

determined. The trial judge summarily denied the Motion without even interrogating the Defendant (TR 11).

At the trial, unrebutted evidence was adduced from Bertha Jones, natural mother of Defendant (TE 118); from Doctor Charles Baron, Defendant's Physician (TE 136); and from Thelma Elliott, Defendant's ex-wife (TE 157), that Jerry Jones was a sick man, both at the time of the incident which gave rise to the murder indictment and up to and through the time of the trial.

The jury returned a verdict of guilty on the wilful murder charge. Defense counsel, in its Motion and Grounds for a new trial, charged the trial court with reversible error in failing to grant Defendant's Motion for a competency inquest. On Appeal, Defendant's counsel again raised the constitutional issue, and in the Petition for Rehearing the issue was once again raised. On each occasion the issue was rejected, each respective court holding that the decision to grant a competency inquest is within the broad discretion of the trial judge, and each court found no abuse of discretion.

Petition for Writ of Certiorari was filed with this Court on June 17, 1974, and on April 28, 1975 this Court entered the Order quoted above. From the June 20, 1975 Order of the Court of Appeals of Kentucky re-affirming Defendant's conviction, we hereby respectfully appeal.

THE QUESTION IS SUBSTANTIAL

WHERE A PRE-TRIAL MOTION FOR A COMPENTENCY HEARING HAS BEEN MADE, ALLOWING THE TRIAL JUDGE BOARD DISCRETION TO DENY SUCH A HEARING CONSTITUTES AN INADEQUATE PROCEDURE TO PROTECT THE RIGHTS OF ALL DEFENDANTS FROM BEING CONVICTED WHILE LEGALLY INCOMPETENT.

A.

In *Drope* v. *Missouri*, 420 U.S. ——, 95 S.Ct. 896, decided February 19, 1975, this Court re-affirmed the constitutional right of a criminal Defendant to be free from conviction while legally incompetent. The rationale behind that right is that the accused, if legally incompetent at the time of trial, will not be able to assist in his defense.

The test for competency was expressed clearly in *Dusky* v. *United States*, 362 U.S. 402, 80 S. Ct. 788 (1960). The question should be ". . . whether he (Defendant) has present sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as actual understanding of the proceedings against him." 362 U.S. at 402, 80 S. Ct. at 789. In *Drope*, this Court cited the *Dusky* test with approval. 420 U.S. at ——, 95 S. Ct. at 904.

Pate v. *Robinson*, 383 U.S. 375, 86 S. Ct. 836 (1966) firmly established the constitutional basis for the right to be competent at the trial, stating that "the conviction of an accused person while he is legally incompetent violates due process (citation omitted), and state procedures must be adequate to protect this right. *Id.* at 378, 86 S. Ct. at 838. *Pate* established at least two governing principles

for exercise of the right. First, the Defendant's demeanor at trial is not the only factor to be considered — history of mental infirmities is also to be used as a standard. Second, even if the Defendant makes no Motion for a Competency Hearing, the trial court has the duty to order such a hearing *sua sponte* if the evidence adduced at trial creates a sufficient doubt of mental incapacity.

In *Drope,* this Court decided that, contrary to the view of the trial judge, the evidence revealed at trial was such as to create a "sufficient doubt" of the Defendant's competency to stand trial, thus requiring further inquiry under *Pate.* The Court said: "The record revealed a failure to give proper weight to the information suggesting incompetence which came to light during trial."

The Court specifically left undecided another question: Whether defense counsel's pre-trial contention that the Defendant was not of sound mind and should have a psychiatric examination was sufficient by itself to raise the issue of competency and mandate a psychiatric evaluation in accordance with state procedures. *Drope,* 420 U.S. at ——, 95 S. Ct. at 906. It is that question which Petitioner now presents before this Court.

B.

Kentucky Rule of Criminal Procedure 8.06 provides that whenever reasonable grounds arise to believe that the Defendant is insane, the proceedings shall be postponed and the issue of sanity determined as provided by law. The phrase "provided by law" in Rule 8.06 apparently refers to civil competency proceedings, as set out in Chapter 203 of the Kentucky Revised Statutes. *See* Note, 57 Ky. L.J. 527, 528. Under such proceedings, when the trial judge is convinced that Defendant's competency is in question (reasonable grounds), the judge appoints two physicians

or one physician and one clinical psychologist to examine the Defendant. The doctors are required by Ky. Rev. Stat. Section 203.015 to certify to the Court whether the Defendant is mentally disabled. The doctors are provided a fee of Ten ($10.00) Dollars each for the examination.

On its face the Kentucky Procedure seemed adequate to protect a Defendant's right to be mentally competent at trial. A survey of Kentucky authorities, however, revealed that the trial judge was afforded broad discretion as to just what constituted a reasonable ground, and that the trial judge's decision would be overturned on appeal only upon a clear showing of abuse of that discretion. *See, e. g., Russell* v. *Commonwealth,* 482 S. W. 2d 584 (Ky. 1972). These and similar cases led us to conclude that the trial judge's discretion was so broad as to render the Kentucky Procedure inadequate.

When *Jones* v. *Kentucky* was vacated and remanded in light of *Drope,* the implication was that Kentucky Procedure did not conform with requirements of due process. In an Opinion written shortly thereafter, however, the Kentucky Court of Appeals, in *Via* v. *Commonwealth,* 522 S. W. 2d 848 (Ky. 1975), stated that Kentucky Procedure had always conformed to the *Drope* standard. The implication of *Via* is that the trial judge's discretion may not be so broad as the earlier cases suggested. Despite this apparent confusion, however, it still is clear that the trial judge himself must weigh the evidence as to competency.

C.

In both the *Drope* and *Pate* cases there was evidence of various types of bizarre behavior by the Defendants. Such behavior fit the pattern of what a layman would consider an indication of insanity, and this Court held that such

obvious evidence could not be disregarded. Thus, when there is evidence of mental incapacity that a layman would recognize as such, the standard established by *Drope* is more than adequate to protect the Defendant's rights. The *Drope* test is particularly appropriate where no motion has been made by the Defendant and the Judge has to exercise his duty to order a competency hearing *sua sponte*.

The facts of the case at bar do not fit the pattern of *Drope*. Dr. Charles Baron, a specialist in Psychiatry who gave the only medical testimony at trial, testified that Defendant is a "depressive reactor" and is under continual medical care and constantly receives medication (TE 136). Dr. Baron testified that a depressive reactor is one who is "non-communicative, talks very little, does not want to go anywhere, really non-giving and non-receiving" (TE 136). Although one in this condition certainly would have difficulty cooperating in his defense, the symptoms of this mental deficiency are quite the opposite of the bizarre behavior in *Drope* and *Pate*.

Defendant's pre-trial Motion for a competency hearing was overruled because the trial judge did not believe that the supporting affidavit raised reasonable grounds of incompetency. The judge did not have a discussion with the Defendant and made no attempt to investigate the issue further. Even if he had, however, it is unlikely he would have recognized Defendant's symptoms as constituting a mental deficiency.

This Court has recognized that evaluation of psychological factors is a difficult task, and that even trained psychiatrists often disagree on their evaluation of the same facts. *Drope*, 420 U.S. at ——, 95 S. Ct. 908. Determination of whether a Defendant has exhibited any indicia of mental incapacity requires medical evaluation. This is especial-

ly true when the particular mental deficiency is not manifested by bizarre behavior or other outward signs which a layman would associate with insanity. A trial judge is not trained in the diagnosis of psychological disorders. How, then, can a trial judge be expected to "weigh the evidence" and make an accurate preliminary determination of mental incompetency? We submit that the *Drope* standard of allowing the trial judge to weight the evidence of incompetency to arrive at "sufficient doubt" is not adequate to protect the Defendant's right in all cases. In cases like the one at bar, the judge, due to his lack of medical training, simply will not recognize the evidence of incompetency which he is supposed to weigh. The end result is that Defendants with mental infirmities which manifest themselves in bizarre patterns of behavior are much more likely to receive the constitutionally guaranteed psychiatric examination than those Defendants who suffer from more subtle, but just as real forms of mental illness.

The *Drope* standard still will be appropriate in cases where no Motion has been made but where "obvious" indicia of insanity come to the judge's attention. It is our contention, however, that once the Defendant has made a Motion before trial a different standard should apply. Once a Motion is made, unless frivolous or not made in good faith, psychiatric examination should always be granted. This is currently the law in the Federal System. *See United States* v. *Walker*, 301 F. 2d 211, 214 (6th Cir. 1962) (applying 18 U.S.C. Section 4244). Since the right to be free from conviction while legally incompetent is a constitutional requirement, this also should be the law of the states. The kind of justice a man receives can not be made to depend on the courthouse in which he is tried.

In the case at bar, the Defendant's pre-trial Motion was supported by an Affidavit from Defendant's mother, de-

scribing Defendant's history of emotional disturbances and psychiatric treatment. While the Affidavit by itself, of course, was not sufficient to establish competency, it was enough to raise the issue. The trial judge should not have been free to weigh the Affidavit against supposed indicators of incompetency, and he should not have been free to disregard the Affidavit. Such decisions required medical expertise.

The trial judge should have been limited to determination of the legal question whether the Motion was made in good faith and not for the purpose of delay. The standard of good faith should be: Is there any evidence to support the Motion for a Competency Hearing? Since there was some evidence to support the Motion in the instant case (the events described in the Affidavit), the Judge should have had no further discretion to deny the Motion.

CONCLUSION

Drope and *Pate* are characterized by evidence of bizarre behavior which can easily be detected by persons without medical training. Indeed, the Kentucky Court of Appeals emphasized the lack of bizarre behavior in its re-affirmance of Defendant's conviction. Certain mental defects, however, are so subtle, that a judge, without medical training, is incapable of recognizing the indicia and symptoms constituting the infirmity. Because of this, once the issue of competency is brought to the court's attention pre-trial the court should only determine that the Motion is made in good faith and is not frivolous. After such determination, failure to make adequate inquiry into Defendant's competency is in violation of the rationale of *Drope*, even if not the precise letter. For this reason, Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for the Petitioner

APPENDIX A

ORDER OF THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 28, 1975

E. Andre' Busald, Esq.
Blakely, Busald, Robinson & Funk
226 Main St.
Florence, Ky. 41042

RE: Jerry Timothy JONES v. KENTUCKY,
73-1884

Dear Sir:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the Court of Appeals of Kentucky for further consideration in light of *Drope* v. *Missouri,* 420 U.S. —— (1975).

Mr. Justice Douglas took no part in the consideration or decision of this petition.

Encl. – cc opin. in *Drope* v. *Missouri*

Very truly yours,

Michael Rodak, Jr., Clerk
By
/s/ HELEN TAYLOR
Helen Taylor (Mrs.)
Assistant Clerk

Carl Miller, Esq.
Asst. Attorney General of Kentucky
Capitol Bldg.
Frankfort, Ky. 40601

APPENDIX B

MANDATE OF THE COURT OF APPEALS OF KENTUCKY

The Commonwealth of Kentucky, The Court of Appeals Jerry Timothy Jones vs. Commonwealth of Ky.	75 Term — June 20, 1975 *Appeal from a judgment of the Boone Circuit Court* Ind. #71-49, File # F-303-72

The Court being sufficiently advised, delivered herein an opinion per curiam, and it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

/s/ FRANCES JONES MILLS,

A copy—Attest:

FRANCES JONES MILLS, C. C. A.

By ....., D. C.

Issued July 22, 1975

RENDERED:
June 20, 1975

COURT OF APPEALS OF KENTUCKY

F-303-72

JERRY TIMOTHY JONES,
APPELLANT,

v.

COMMONWEALTH OF KENTUCKY,
APPELLEE.

Appeal From Boone Circuit Court
Honorable James R. Ford, Judge
Indictment No. 71-49

MEMORANDUM OPINION PER CURIAM AFFIRMING

A jury found Jerry Timothy Jones guilty of willful murder and fixed his punishment at life imprisonment. Upon appeal this court, by its opinion of October 12, 1973, affirmed the judgment of conviction. Upon appeal to the United States Supreme Court, it was ordered on April 28, 1975, "that the judgment of said Court of Appeals in this case be vacated with costs, and that this cause be remanded to the Court of Appeals of the Commonwealth of Kentucky for further consideration in light of *Drope* v. *Missouri*, 420 U.S. —— (1975)."

Upon remand this court has considered its opinion of October 12, 1973, and adopts the opinion *in toto* with

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this further extension regarding the rule of *Drope* v. *Missouri, supra*. *Drope* reaffirms the proposition that when a court is put on notice that a defendant coming on for trial lacks the capacity to understand the nature and object of the proceeding, to consult with counsel, or to assist in preparing his defense, he may not be subjected to a trial. Although this is the ancient common-law rule, *Drope* promulgates guidelines which must be considered by a trial court in determining whether the trial should proceed, the trial court being required to take into consideration evidence of the defendant's prior irrational conduct, his demeanor at trial, and any medical opinion on his competence to stand trial.

Briefly, Drope, along with four companions, forcibly raped his wife and subjected her to other bizarre abuses and indignities. His bizarre conduct ran the gambit from sexual perversion to rolling down the stairs if he couldn't get what he wanted. Also, in the course of the trial he tried to commit suicide. Prior to the trial, a motion had been made requesting a psychiatric examination and evaluation, which motion was supported by a report from a psychiatrist who concluded that Drope was a very neurotic individual and that he suffered from a sociopathic personality disorder, sexual perversion, borderline deficiency, and chronic anxiety reaction with depression.

None of the conditions detailed in *Drope* obtains in the prosecution and conviction of Jerry Timothy Jones. Jones was charged with a murder that he committed in the back room or restroom of a bar while he was exceedingly intoxicated. The murder was committed on December 29, 1971. Jones was indicted, and the prosecution was set for trial on April 18, 1972. However, on the trial date the case was continued because Jones was hospitalized with uncontrolled diabetes. On August 24, 1972, Jones filed

a motion requesting that the court enter an order allowing and granting him psychiatric examination and evaluation by two psychiatrists to determine whether he was mentally competent to stand trial. This motion was not supported by either medical reports or affidavits of physicians. There was filed with the motion the affidavit of Jones' "natural mother." Although the major portion of it is of the rankest type of hearsay, this affidavit does not detail any irrational behavior on the part of Jones. It consists primarily of a detailed history of Jones' alcholism and diabetes and of the dire results visited upon a diabetic who attempts to satisfy his bent for alchol.

Counsel for Jones did not at any time prior to or during the trial indicate to the court that they were of the opinion that Jones was not competent to stand trial or to participate in his defense.

The motion and affidavit filed prior to trial did not in themselves make a sufficient or any showing of the type that would require the trial judge to grant the motion or to cause a hearing to be conducted into the mental competency of Jones and of his ability to stand trial and to intelligently aid in his defense.

The events of the trial are such that they clearly justify the action of the court, and these events, even when coupled with the motion and affidavit of the natural mother, would not require a hearing on the question of Jones' mental competency. Jones and his natural mother, together with his physician, Dr. Charles Baron, testified at the trial. We have carefully examined the testimony of these witnesses, and according to the record Jones exhibited a very cool and collected approach to his defense. His testimony was coherent and orderly, and he recited events in a chronological order. There was no evidence of any bizarre conduct which in any way hinted that there

might be a question concerning his ability to actively and positively assist in his defense. The testimony of his mother added nothing that was not contained in her affidavit other than the fact that it was her opinion that he was so drunk at the time he committed the crime that he didn't know what he was doing. The good doctor who had treated him for so long recounted an extensive history of uncontrolled diabetes, with crisis after crisis triggered by the overconsumption of alcohol. The doctor did inject here and there the fact that there was an anxiety aspect to Jones' conduct, but this seems to have been one of the sidelines or side effects of Jones' other weaknesses. The doctor did not say, even in his testimony at the trial, that the mental condition of Jones was such that he should not have been tried or that he was not competent to participate in his own defense.

None of the witnesses recounted anything other than the trials and tribulations of a diabetic who has the unfortunate luck of also being an alcoholic. Jones apparently has never learned that consumption of alcohol by a diabetic is even more dangerous than playing Russian roulette.

Upon a consideration of all of the evidence, this court has concluded that Jones was not deprived of any constitutional rights and that the trial court conformed to the guidelines of *Drope* v. *Missouri,* 420 U.S. —— (1975), and did not abuse its discretion. *Edwards* v. *Commonwealth,* Ky., 500 S.W.2d 396 (1973).

The judgment is affirmed.

All concur.

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APPENDIX C

MANDATE OF THE COURT OF APPEALS OF KENTUCKY

The Commonwealth of Kentucky, The Court of Appeals Jerry Timothy Jones vs. Commonwealth of Ky.	73 Term – October 12, 1973 *Appeal from a judgment of the Boone Circuit Court* Ind. No. 71-49 F-303-72

The Court being sufficiently advised, it seems there is not error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended.

/s/ FRANCES JONES MILLS,

A copy—Attest:

FRANCES JONES MILLS, C. C. A.

By ....., D. C.

Issued January 18, 1974

RENDERED:
October 12, 1973

COURT OF APPEALS OF KENTUCKY

F-303-72

JERRY TIMOTHY JONES,

APPELLANT,

v.

COMMONWEALTH OF KENTUCKY,

APPELLEE.

Appeal From Boone Circuit Court
Honorable James R. Ford, Judge
Indictment No. 71-49

MEMORANDUM OPINION OF THE COURT BY COMMISSIONER CATINNA AFFIRMING

(Not to be cited as authority)

A jury found Jerry Timothy Jones guilty of willful murder and fixed his punishment at life imprisonment. Upon appeal he alleges nine grounds for reversal of conviction.

(1) The conviction of willful murder should be set aside because the indictment was defective in that it read "* * * Jerry Timothy Jones did murder Ronnie Wayne Cook by shooting him * * *." Appellant claims that because the words "feloniously" and "willfully" were not present the indictment was defective. The record indicates that Jones did not object to this so-called defective indictment at any time prior to or during the trial and did not raise it in his motion and grounds for new trial. Failure to raise this objection prior to this appeal constituted a waiver, and the issue is not reviewable by this court. Vickers v. Commonwealth, Ky., 472 S.W.2d 469 (1971).

(2) It was error for the court to overrule Jones' motion for a continuance to allow a psychiatric examination. This motion was made on the day before the trial date. RCr 8.06 requires that the motion be made at the time of arraignment. The court did not abuse its discretion in overruling the motion. Hicks v. Commonwealth, Ky., 488 S.W.2d 703 (1972); Russell v. Commonwealth, Ky., 482 S.W.2d 584 (1972).

(3) The court's instruction on insanity did not conform to the laws of the Commonwealth. It is true that the instruction did not specifically contain certain wording as found in Terry v. Commonwealth, Ky., 371 S.W.2d 826 (1963). However, the instruction, as given, adequately and accurately reflects the law of the Commonwealth.

(4) The court erred in not submitting to the jury an instruction advising that extreme intoxication is a factor

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that would reduce the crime from willful murder to a lesser offense, and (5) the court erred in overruling defendant's motion for a reduction of the charge from willful murder to manslaughter as a matter of law. Objections 4 and 5 both deal with the fact that Jones claimed to have been extremely intoxicated. The court instructed the jury on willful murder, voluntary manslaughter, and involuntary manslaughter. This gave the jury an option to convict Jones of any degree of the crimes charged, depending upon the evidence. Therefore, no instruction on intoxication was necessary. Whether the defendant was guilty of willful murder or manslaughter was a question for the jury. Abbott v. Commonwealth, 305 Ky. 620, 205 S.W.2d 348 (1974).

(6) The verdict is not sustained by the evidence and is contrary to law. The record shows that Jones was carrying a gun on the night of the murder, and he admitted the gun was in his hand when it went off and that one or more of the shots so fired hit Ronnie Cook. There was more than enough evidence to take the case to the jury.

(7) The constitutional rights of Jones were violated by the delay in taking him before a magistrate contrary to RCr 3.02, during which time he made statements prejudicial to his interests without first receiving the Miranda warning. We find that Jones first raised the question concerning this alleged delay upon this appeal. Therefore, the issue is not now reviewable.

(8) The court erred in the manner of selection of the jury in failing to sustain Jones' motion to discharge the panel on the ground that by a systematic process black people were excluded. The record does not show that any such motion was made by Jones, this ground being first mentioned in his motion and grounds for new trial. No

showing was made as to the method used to exclude blacks, even though Jones was required to make a showing of a concrete nature through affidavits, testimony, or other evidence that the exclusionary tactics occurred. Martin v. Commonwealth, Ky., 361 S.W.2d 654 (1962); Alexander v. Louisiana, 405 U.S. 625 (1971).

(9) Finally, the court abused its discretion in allowing the Boone County trial commissioner to testify in the case after the rule as to separation of witnesses was invoked. This ruling addresses itself to the sound discretion of the court. Dennis v. Commonwealth, Ky., 464 S.W.2d 253 (1971). An examination of the testimony of the trial commissioner is sufficient to determine that there was no abuse of discretion on the part of the court.

The judgment is affirmed.

All concur.

ATTORNEYS FOR APPELLANT:
Howell W. Vincent
130 Park Place
Covington, Kentucky 41011

E. Andre' Busald
11 Locust Street
Florence, Kentucky 41042

ATTORNEYS FOR APPELLEE:
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APPENDIX D

BOONE CIRCUIT COURT

COMMONWEALTH OF KENTUCKY,
PLAINTIFF,

vs.

JERRY TIMOTHY JONES,
DEFENDANT.

JUDGMENT

INDICTMENT 71-49

The above defendant having been found guilty by a jury on the 25th day of August 1972, of the crime of wilful murder and the jury having fixed the punishment at confinement in the penitentiary for and during his natural life,

IT IS THEREFORE the judgment of this court that the defendant, Jerry Timothy Jones, is guilty of the jury verdict of guilty of the crime of wilful murder as charged in the indictment and his punishment is fixed at confinement in the penitentiary for and during his natural life and the imposition of sentence herein is suspended pending an appeal to the Court of Appeals.

ENTERED IN ORDER
BOOK 4 PAGE 225
DATE 8-29, 1972

Given under my hand this 29th day of August 1972.

/s/ JAMES R. FORD
JUDGE

BOONE CIRCUIT COURT

INDICTMENT NO. 71-40

COMMONWEALTH OF KENTUCKY,
PLAINTIFF,

vs.

JERRY TIMOTHY JONES,
DEFENDANT.

MOTION

OVERRULED

Defendant, Jerry Timothy Jones, moves the Court to enter an Order allowing and granting to the defendant psychiatric examination and evaluation by two competent psychiatrists to be chosen by the Court and requiring such examining authority to make and file with this Court a written report embodying the findings which shall include, but not be limited to, a finding and declaration of whether or not defendant is mentally competent to stand trial on the charges set forth in the Indictment or is able to participate properly in his defense.

In support of this Motion, defendant attaches hereto and makes a part hereof, the same as if set out in full herein, the Affidavit of Bertha Edith Jones, natural mother of the defendant.

WHEREFORE, defendant demands that this Motion be sustained.

FILED 8-23-72
MABEL BENSON, Clerk
BY M. B.

/s/ HOWELL W. VINCENT
130 Park Place
Covington, Kentucky

/s/ E. ANDRE' BUSALD
11 Locust Street
Florence, Kentucky
ATTORNEYS FOR
DEFENDANT

A copy of the foregoing Motion and Affidavit was served by delivering the same to Hon. Otis P. Lanter, Commonwealth's Attorney, Courthouse, Burlington, Kentucky, this 24th day of August, 1972.

/s/ HOWELL W. VINCENT
Of Counsel for Defendant

STATE OF KENTUCKY)
) AFFIDAVIT
COUNTY OF KENTON)

Affiant, Bertha Edith Jones, being first duly sworn, deposes and states that she is the natural mother of Jerry Timothy Jones, Defendant in Indictment No. 71-49, now pending in the Boone Circuit Court; that Jerry Timothy Jones was born on May 3, 1941; that seventeen years after the birth of Jerry Timothy Jones the said Jones began to manifest highly nervous tensions and emotional disturbances, and that shortly thereafter Doctor Thomas A. Weldon, a regular practicing psychiatrist in the City of Covington, Kentucky, was called upon to treat the said Jerry Timothy Jones; that the said Jones was hospitalized and placed in the psychiatric ward at St. Elizabeth Hospital for

a period of several days; that thereafter and periodically from 1962 up to and including 1966, Jerry Timothy Jones was treated by another outstanding psychiatrist, Doctor R. Charles Smith, of Newport, Kentucky, and was confined to St. Elizabeth Hospital and Booth Hospital at Covington, Kentucky, on more than one occasion.

That during this period from 1962 to 1964 and on September 21, 1964, Jerry Timothy Jones was seen by Doctor Charles Baron of Covington, Kentucky, who examined and treated the said Jerry Timothy Jones on several occasions; the last date of the period of treatment being December 21, 1964; that thereafter; the condition attending said Jerry Timothy Jones, to-wit: alcholism and emotional instability persisted and progressed to the point that he called upon Doctor Huey of Walton, Kentucky, in the year of 1968; during the examination and treatment of the said Jones it was discovered that he was possessed with a serious disease commonly known as "diabetes millitus"; that after this discovery, the defendant Jones returned for examination, treatment and guidance by Doctor Charles Baron who has continuously been his physician and psychiatrist ever since: that Doctor Baron examined and treated defendant Jones on October 19, 1968, wherein he had blood sugar of 180; that from and since December 13, 1971, the defendant Jones was admitted to St. Elizabeth Hospital and discharged on the following dates:

Admitted		Discharged
13/13/71		12/21/71
12/13/		12/21/71
12/30/71		1/ 9/72
3/ 4/72		3/15/72
3/17/72		3/20/72
4/17/72		4/27/72
8/14/72	(emergency)	8/14/72

That on July 7, 1972, defendant Jones was admitted to Booth Hospital and discharged July 11, 1972.

Affiant further states that the defendant Jones did not possess sufficient mental capacity at the time of the alleged crime due to acute alcoholism and diabetes millitus to know right from wrong or being able to know right from wrong was unable to control or resist an emotional impulse and that because of the conditions existing in the mental and physical makeup of the defendant Jones, as is revealed by his medical history in and out of the hospitals as herein set out, said defendant is now incapable of aiding or assisting in his defense upon the charge of Murder in the Boone Circuit Court; that this Affidavit is made for the purpose of supporting a Motion to have the said defendant Jones examined by two competent psychiatrists and after reviewing his medical history, examination and diagnosis, to make a written report to the Court on his mental and physical condition.

Further Affiant saith not.

/s/ BERTHA EDITH JONES
AFFIANT

Subscribed and sworn to before me this 23rd day of August, 1972.

/s/ LYNDA J. ANDERSON
Notary Public, State at Large

SEAL
My comm. expires: 12/18/74.